

Getting Washington Back to Work

Sine Die 2003



Civil Liability & Medical Malpractice Reform

*"It's time to return 'justice' to
the civil justice system."*

Frivolous lawsuits and outlandish judgments are driving up the cost of housing, causing medical clinics to close, and putting people out of business and out of work.

Wide-open and wildly unpredictable liability affects everyone, from daycare workers to doctors; from grocery stores to construction companies; from the average citizen to state and local governments.

Caps on non-economic damages do work. Since the 1970s, California has limited "pain and suffering" payouts to \$350,000. From 1976 to 2000, malpractice insurance premium increases in California (167percent) were only a third of increases nationally (500 percent).

- The annual cost of America's tort system exceeded \$165 billion in 1999.
- Multi-family home construction in the Puget Sound region has dropped by more than a third over the last two years due to the lack of available and affordable liability insurance. This kind of market puts small contractors out of business.
- Thirty-one percent of Washington's doctors have left the state because of medical malpractice costs — many others are limiting their practices, especially in the high risk areas like obstetrics.
- Washington malpractice claims in 2001 cost insurers \$44.7 million. This cost is passed on to health care providers — and to patients, not only in the cost of health care, but in access.

The Liability Reform Act of 2003 (ESSB 5728)

Part 1—Joint and Several Liability

Under current law, one party in a multi-party lawsuit can be found 10 percent responsible, but made to pay 100 percent of the judgment. ESSB 5728 replaces this "joint and several liability" rule with "proportionate liability."

- Fair is fair! If someone is found 10 percent responsible, the obligation cannot be more than double or 20 percent. Lawyers should not be able to go after “deep pockets” to collect the most money possible. Responsibility and ability to pay are not the same thing.

Part 2— Employer Reference Checks

Under current law, employers have no protection against lawsuits when they give honest , work-related information about a former employee during a reference check. Because of this, “bad performance reviews” can get buried and reference checks can be of little value.

- The Governor’s 1998 Small Business Conference attendees identified the need for “good faith” immunity as their second-highest need. Employers need to be able to tell the truth without risking a lawsuit.

Part 3—Tort Judgment Interest

Current law sets tort judgment interest rates of at least 12 percent when an appeal is lost. This old 1970s language reflects a different time and different interest rates.

- We need a reality check. Times change, and the rules must too. ESSB 5728 ties interest rates to two percentage points above the Treasury Bill rate, which was 1.182 percent in January 2003.

Part 4—Medical Malpractice

Current law places no cap on non-economic damages, allows the State Supreme Court to make exceptions to the mediation requirement and allows suits to be brought many years after the fact.

- Non-economic or “pain and suffering” awards are emotion-based and have no yardstick. The uncertainty of these payouts and the uncertainty over when a suit can be filed drive up the cost of liability insurance.

- ESSB 5728 caps non-economic damage awards at \$350,000, requires a 90-day notice of the intent to file a suit and limits the commencement of actions to no more than three years unless there is proof of fraud.

Part 5—Construction Liability

The insurance industry is pulling out of the contractor liability market in Washington — new contractors are being refused coverage and those who already have coverage are finding renewals extremely costly, particularly those who build multi-family homes. The cost of this situation is the loss of affordable housing opportunities for Washington citizens.

- ESSB 5728 creates a list of “affirmative defenses” for contractors who are sued for fault they should not be held responsible for — like natural disasters or owner-made alterations or failure to conduct maintenance.

Note: SHB 2039 was signed into law on April 21. This measure provides general construction liability relief through affirmative defenses.

- Claims by homeowners for valid construction defects are protected in this measure, while still reducing costly and unnecessary litigation.

Part 6—Seatbelt Defense

Under current law, juries are not allowed to know if a person hurt in a car accident was wearing a seatbelt or not — despite the fact that wearing a seatbelt is required by law and despite the fact that seatbelt use has been proven to reduce serious injuries and death.

It’s time to be fair. If the injured party was breaking the law and suffered more injuries as a result, the jury should know. ESSB 5728 simply allows this information to be entered into evidence.

Part 7—Government Liability

In the private sector, businesses pass the costs of being sued along to their customers in higher prices, or to their employees in job layoffs. But in government, taxpayers have to pay the bill in full.

From 1985 to 2000, the state tort claim payouts ranged from \$6 million to \$26 million. In 2001, the state’s tort claim bill was over \$80 million.

Under ESSB 5728, state and local governments are not liable for claims of over \$1 million or in the case of more than one claim arising out of a single incident, the cap is \$2 million.

Status: Passed the Senate 28-21. Died in House Judiciary Committee. No hearing.

Medical Malpractice Reform (ESSB 5209)

Without significant changes in the state’s medical malpractice arena, more insurers will leave the market and more doctors will restrict their practices or leave Washington altogether.

- ESSB 5209 caps non-economic damages at \$350,000. Non-economic damages are subjective losses such as pain and suffering.

- The court's ability to allow periodic payments for damages in excess of \$50,000 is expanded.
- A 90-day notice to the defendant is required before a malpractice action may begin.
- The amount an attorney may collect in contingency fees is limited and based on the amount recovered.
- The commencement of malpractice actions must be within three years unless there is proof of fraud.

Status: Passed the Senate 30-19. Died in House Judiciary Committee. No hearing.